No. 21-5432

IN THE

SUPREME COURT OF THE UNITED STATES

DEANGELO JOHNSON,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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Reply to Brief in Opposition

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This Court should grant review to resolve the standard for the government's burden of proof to support the knowledge-of-status element in a prosecution for unlawful possession of a firearm by a person convicted of a misdemeanor crime of domestic violence, 18 U.S.C. § 922(g)(9). This is an important question of federal law, expressly left open in *Rehaif v. United States*, 139 S. Ct. 2191, 2200 (2019), on which the circuits are split. And this case is an ideal vehicle to address the question because there are undisputed facts showing that Mr. Johnson did not know that his prior offense qualified as a "misdemeanor crime of domestic violence" under federal law, affording Mr. Johnson a strong defense at trial that he lacked knowledge-of-status.

In its brief in opposition, the government does not deny the importance of the question presented, nor does it dispute that *Rehaif* expressly left the question of the government's burden of proof in, among others, a § 922(g)(9) prosecution. Likewise, the government does not argue that Mr. Johnson's case presents any vehicle issues. Rather, the government's reasons for arguing against review are twofold, neither of which are compelling enough to deny review.

1. To begin with, the government argues against granting review by denying that a circuit conflict exists. But despite its denial, the Seventh and Eleventh Circuits disagree over the legal standard for the government's burden on the knowledge-of-status element in a § 922(g)(9) prosecution.

On the one hand, the Seventh Circuit holds that "the government ha[s] to prove that [a defendant] knew he had been convicted of a 'misdemeanor crime of domestic violence' as that phrase is defined for purposes of § 922(g)(9)." *United States v. Triggs*, 963 F.3d 710, 715 (7th Cir. 2020). On the other hand, the Eleventh Circuit, in the decision below, found that the government need only show that a defendant knew he engaged in the conduct that constitutes a misdemeanor crime of domestic violence, "whether or not the defendant actually knew that the Supreme Court had defined the term and what that definition was." *United States v. Johnson*, 981 F.3d 1171, 1182-83 (11th Cir. 2020).

The Seventh and Eleventh Circuits have thus laid out competing legal standards on the government's burden of proof about the knowledge-of-status element in a § 922(g)(9) prosecution. In the Seventh Circuit, the government has to show that a defendant knew his/her prior offense qualified as a "misdemeanor crime of domestic violence" under federal law—i.e., requiring proof of knowledge of the law. In the Eleventh Circuit the government is merely required to show that a defendant knew of the conduct that constitutes a "misdemeanor crime of domestic violence"—i.e., requiring proof only of knowledge of the facts. These are two irreconcilable standards that require the Court's intervention to decide which of the two competing views align with *Rehaif*.

The government tries to downplay the circuit conflict by casting *Triggs* as a fact bound decision and arguing the Seventh Circuit there did not address whether

admissions in a stipulated bench trial would be sufficient evidence at trial to establish knowledge. BIO 26. But the government misses that the Seventh Circuit granted Triggs relief based on its legal holding: requiring the government to show that a defendant knew his/her prior offense qualifies as a "misdemeanor crime of domestic violence" under federal law. And the Eleventh Circuit below denied Mr. Johnson relief because it held that the government need not show a defendant knew his/her prior offense had as an element the use or attempted use of physical force, even though federal "physical force" is an legal element under § 922(g)(9).

For these reasons, the Seventh and Eleventh Circuits are in direct conflict over the knowledge necessary for a conviction under § 922(g)(9). Moreover, under the Seventh Circuit's approach, Mr. Johnson would be afforded relief because, as in *Triggs*, the facts show that Mr. Johnson had a plausible defense at trial that he lacked the crucial *mens rea* element separating criminal from otherwise innocent conduct. *See Triggs*, 963 F.3d at 717 ("What matters is that in light of *Rehaif*, [Triggs] has a plausible defense," "But it's not necessary to weigh Triggs's likelihood of success at trial."). So not only are the circuits in conflict over an important federal *mens rea* question, the Court's resolution of the issue would be outcome determinative in Mr. Johnson's case, resolving whether the *Rehaif* error entitles him to a new trial under *Rehaif*.

2. The government also argues against granting review by defending the Eleventh Circuit's reasoning on the merits. But its arguments, which are based

largely on a mischaracterization of Mr. Johnson's position, simply underscore the need for the Court's intervention to be the final arbiter on this hotly contested issue.

At the outset, § 922(g)(9)'s text requires proof that a defendant knew his prior offense qualifies as a misdemeanor crime of domestic violence. So, for example, if the government presents evidence from a plea colloquy where a defendant is advised that his misdemeanor offense carries with it a collateral legal consequence of qualifying as a federal misdemeanor crime of domestic violence; or is advised by his attorney of the same in a different proceeding; or if the government presents evidence that a defendant knew he was prohibited from carrying a firearm, these are the types of circumstantial evidence that could show a defendant's knowledge-of-status.

The government mistakenly suggests that the only way in which the government could prove knowledge-of-status in a § 922(g)(9) case is by showing the defendant performed a categorial analysis. BIO 16-17. Building on its mistaken view, the government also speculates that interpreting § 922(g)(9)'s *mens rea* requirement in accordance with its text would make prosecutions under this provision unduly burdensome. *Id.* at 20. Both these arguments are wrong.

As for the legal burden-of-proof question, because "misdemeanor crime of domestic violence" is a complex legal term of art, *Rehaif* requires the government's burden in a § 922(g)(9) prosecution to prove a defendant's knowledge of the law. As *Rehaif* explains, the maxim "ignorance of the law is no excuse" does not normally

apply when a defendant "has a mistaken impression concerning the legal effect of some collateral matter and that mistake results in his misunderstanding the full significance of his conduct," thereby negating an element of the offense. 139 S. Ct. at 2198.

Indeed, as Chief Justice Roberts explains in his concurring opinion in *McFadden v. United States*, when "there is a legal element in the definition of the offense, a person's lack of knowledge on that legal element can be a defense." 576 U.S. 186, 199 (2015) (Roberts, C.J, concurring in part) (citing *Liparota v. United States*, 471 U.S. 419 (1985)). Consider, for example, *Rehaif* itself. There, the parties did not dispute that Rehaif was aware of the facts that made his status in the country illegal or unlawful under § 922(g)(5)—i.e., that he received poor grades; was dismissed from his university; and was told that his immigration status would be terminated unless he transferred to a different university or left the country. Even so, the Court did not hold those facts were enough to convict him under § 922(g)(9). Rather, the Court found the government had to prove that Rehaif knew he was in the country illegally or unlawfully as a matter of law, and the question of what quantum of evidence would suffice to meet that burden was left to the factfinder.

Analogously here, § 922(g)(9) includes a legal element—the meaning of misdemeanor crime of domestic violence under federal law and that the offense "has an element, the use or attempted use of physical force." And as Judge Martin explains, in a prosecution under § 922(g)(9), *Rehaif* requires "the government to

show that Mr. Johnson actually knew he was convicted of an offense that had, 'as an element, the use or attempted use of physical force' and thus qualified as a misdemeanor crime of domestic violence." *Johnson*, 981 F.3d at 1196 (Martin, J., dissenting) (quoting § 921(a)(33)(A)(ii)).

In Mr. Johnson's case, the conduct underlying his prior offense led to the collateral legal consequence—he came within the class of persons convicted of a misdemeanant domestic violence under federal law. Mr. Johnson's lack of knowledge that his prior offense qualifies as a misdemeanor crime of domestic violence under federal law thus is a defense to the knowledge-of-status element under *Rehaif*. The Eleventh Circuit's decision is wrong because it does not require the government to prove "a defendant actually knew his offense was a misdemeanor crime of domestic violence," "relieving the government of its burden to obtain convictions under section 922(g)." *Id.* at 1200 (Martin, J., dissenting).

Acknowledging that Mr. Johnson has a valid defense to § 922(g)(9) is different from saying the government must show he performed the categorical analysis, he is entitled to a judgment of acquittal, or that the government is immune from bringing future § 922(g)(9) prosecutions. It is simply an acknowledgment that a defendant's ignorance of the law *is* a defense because the elements of § 922(g)(9) contains a legal component.

The government's only real counter to this argument is to say that the Eleventh Circuit correctly found that the stipulated facts into which Mr. Johnson

entered showed he knew he had been convicted of a misdemeanor crime of domestic violence, because those facts "made clear that petitioner was aware he had been convicted of misdemeanor battery under Florida law." BIO at 14. But this response is classic circular reasoning, assuming that evidence Mr. Johnson was aware of the existence of his prior offense equates to showing he knew his prior offense qualified as a "misdemeanor crime of domestic violence," under federal law.

Whether Mr. Johnson knew of the existence of his prior conviction under Florida law has never been in dispute, nor is it relevant to whether he understood that his conviction brought him under the class of persons defined under § 922(g)(9). More importantly, none of those facts undermined that he has valid ignorance of the law defense given that there is no evidence he was aware his prior offense qualified as a "misdemeanor crime of domestic violence," under federal law. Thus, Mr. Johnson should be granted relief under *Rehaif*.

3. Finally, the government relies on this Court's recent denial of the petition in *Brown v. United States*, No. 21-5060 (Oct. 12, 2021), as a basis to deny Mr. Johnson's petition. But as petitioner in *Brown* explains in his rehearing petition, the Court's denial in *Brown* could signal its preference to address the question presented in Mr. Johnson's case. *See Brown*, No. 21-5060*, pet. reh'g filed* Oct. 20, 2021. Indeed, "this is an unusual offense" because Mr. Johnson was "charged with something that [he] can genuinely say [he] didn't know was unlawful." (Doc. 71 at 17). Thus, at a minimum, the record supports Mr. Johnson has evidence to point to

showing he did not know his 2010 Florida prior qualified as "misdemeanor crime of domestic violence," as defined under federal law, and the government has never argued otherwise. As a result, Mr. Johnson's case is an ideal vehicle to address the government's burden of proof on the knowledge-of-status element in § 922(g)(9).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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